STATE OF MICHIGAN

COURT OF APPEALS

TINA DISHAW, on behalf of the TAXPAYERS FOR THE FOREST PARK SCHOOL DISTRICT,

Plaintiff-Appellant,

v

SOMERVILLE ASSOCIATES, a Wisconsin corporation; GUNDLACH CHAMPION, a Michigan corporation; CARLSON & GOULETTE, INC., a Michigan corporation; and STS CONSULTANTS, a Wisconsin corporation,

Defendants-Appellees.

UNPUBLISHED
June 3, 2003

No. 242048
Iron Circuit Court
LC No. 01-002114-NZ

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Plaintiff Tina Dishaw, on behalf of the taxpayers of the Forest Park School District, appeals from the trial court's order granting summary disposition pursuant to MCR 2.116(C)(8) in favor of defendants Somerville Associates, Gundlach Champion, Carlson & Goulette, Inc., and STS Consultants, on the basis of Dishaw's lack of standing to pursue the claims alleged in the instant case. We affirm.

I

Plaintiff is a resident of Crystal Falls, Michigan, and a taxpayer of the Forest Park School District. Defendants are various contractors involved in the construction of a school addition, which was authorized by voter approval of a $7 million bond in 1997. This addition consisted of approximately 84,000 square feet at the existing high school and a new bus garage. The work also included remodeling of the existing building. The project was inspected by the school district and requisite governmental authorities and accepted by the district as a completed project in August 1998. The building has been used since that time.

In December 2001, plaintiff filed the instant complaint for injunctive relief and damages on behalf of the taxpayers of the Forest Park School District, alleging breach of contract and negligent design and construction of the school addition by defendants. The alleged defects consist for the most part of indoor air quality problems and standing ground water in the lower regions of the building, purportedly resulting in adverse health effects among children and

teachers. Plaintiff contends that it will require substantial repair and modification to the facility to correct these problems; as a consequence, she and other taxpayers have incurred damages, including loss of use of the school building, the payment of personal property taxes for the project, and future property taxes to be incurred to repair the deficiencies.

Plaintiff also moved for certification of this matter as a class action. She sought to be declared a representative of a class of taxpayers suing in their individual right or, alternatively, suing in the place of the Forest Park School District which, as the owner of the building, neither brought an action against the architects, contractors or subcontractors, nor took any official board action on the concerns raised by plaintiff.

Defendants thereafter moved for summary disposition pursuant to MCR 2.116(C)(8), asserting that plaintiff, as an individual taxpayer or as a representative suing on behalf of the school district, lacked standing to bring her claim, and that the real party in interest to any claim for injunctive relief or actual damages was the Forest Park School District. Following a hearing on defendants' motions, the trial court took the matter under advisement and ultimately concluded that plaintiff lacked standing to pursue the present action either on behalf of the school district or as an individual taxpayer. The court found that other issues raised by the parties' motions, including class certification, were thus rendered moot. On May 30, 2002, the trial court entered an order dismissing all counts of the complaint on the basis of lack of standing. Plaintiff now appeals.

II

This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition alleging the real party in interest defense (standing) is properly brought under MCR 2.116(C)(8) or (10) based on the pleadings or other circumstances of the case. *Leite v Dow Chemical Co*, 439 Mich 920; 478 NW2d 892 (1992). A motion brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and

> [a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. at 163. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5). [*Maiden, supra* at 119-120.]

Whether a party has standing is a question of law subject to de novo review. *Lee v Macomb Co Bd of Commr's*, 464 Mich 726, 734; 629 NW2d 900 (2001).

III

On appeal, plaintiff contends that the trial court erred in granting defendants' motions for summary disposition on the basis of her lack of standing to bring the present claims. Specifically, plaintiff contends that she and others within her as yet uncertified class have

standing to sue both on behalf of the school district, because the district has purportedly refused to pursue an action against defendants for their allegedly deficient and negligent performance, and as taxpayers in their own right. We disagree.

Legal actions must be prosecuted in the name of the real party in interest. MCL 600.2041; MCR 2.201(B). A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. *Blue Cross and Blue Shield of Michigan v Eaton Rapids Community Hosp*, 221 Mich App 301, 311; 561 NW2d 488 (1997). In general terms, "standing" means that

> a party is normally required to have a sufficiently concrete interest in bringing a case that it can be expected to provide effective advocacy. *Allstate Ins Co v Hayes*, 442 Mich 56, 58; 499 NW2d 743 (1993). Said another way, standing has been described as a requirement that a party ordinarily must have a substantial personal interest at stake in a case or controversy, as opposed merely to having a generalized interest in the same manner as any citizen. *House Speaker v Governor*, 443 Mich 560, 572; 506 NW2d 190 (1993). Recently, we have described it even more succinctly by indicating that the concept of standing ordinarily requires that a party have "an interest distinct from that of the public." *Lee v Macomb Co*, 464 Mich 726; 629 NW2d 900 (2001). [*Michigan Coalition v Civil Service Comm*, 465 Mich 212, 217-219; 634 NW2d 692 (2001).]

"Traditionally, a private citizen has no standing to vindicate a public wrong or enforce a public right where he is not hurt in any manner differently than the citizenry at large." *Waterford School Dist v State Bd of Ed*, 98 Mich App 658, 662; 296 NW2d 328 (1980). However, the common law bar is lifted pursuant to statutory authority under certain circumstances:

> In Michigan, the common-law bar on taxpayer suits has been relaxed by statute. The Revised Judicature Act permits litigation to prevent the illegal expenditure of state funds or to test the constitutionality of a related statute "in the names of at least 5 residents of this state who own property assessed for direct taxation by the county wherein they reside." MCL 600.2041(3); MSA 27A.2041(3). The taxpayers must demonstrate that they will sustain substantial injury or suffer loss or damage as taxpayers, through increased taxation and the consequences thereof. *Menendez v Detroit*, 337 Mich 476, 482; 60 NW2d 319 (1953), *Jones v Racing Comm'r*, 56 Mich App 65, 68; 223 NW2d 367 (1974). A taxpayer lacks standing unless these requirements are met. [*Id*. at 662-663.]

See also *Menendez, supra; Grosse Ile Comm for Legal Taxation v Grosse Ile Twp*, 129 Mich App 477; 342 NW2d 582 (1983); *Altman v Lansing*, 115 Mich App 495, 501; 321 NW2d 707 (1982); *Kaminskas v Detroit*, 68 Mich App 499, 501-502; 243 NW2d 25 (1976).

Recently, in *Lee v Macomb Co Bd of Commr's, supra*, our Supreme Court revisited the issue of standing in the context of an action brought by the plaintiffs, who were armed services veterans and families of veterans, against two counties and their boards of commissioners to compel the boards to levy a tax to establish a veterans' relief fund in accordance with the soldiers' relief fund act, MCL 35.21 *et seq*. It was uncontested that none of the plaintiffs actually sought relief under the act. The defendants thus asserted that the plaintiffs had suffered no injury

and therefore were without standing to sue and, further, had failed to exhaust their administrative remedies. Ultimately, on appeal, the Supreme Court determined that although the plaintiffs were potential beneficiaries of any monies that were collected and distributed through the soldiers' relief act, they did not have standing to bring the suits. In so holding, the court "flesh[ed] out the tests that a litigant must meet to establish standing," *id*. at 738, and adopted the stringent standing requirements of the federal courts set forth in *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992), which held:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered "an injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."
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> The party invoking . . . jurisdiction bears the burden of establishing these elements. [*Lee, supra* at 739-740, quoting *Lujan*, *supra*, 504 US at 560-561 (citations omitted).]

Applying this test, the *Lee* Court concluded that the plaintiffs therein lacked standing:

> In *Lujan* terms, they have not yet suffered any "injury in fact." See 504 US 560. Specifically, they have shown no "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Id*. at 560. Both groups of plaintiffs have alleged and argued only that they "should receive" and "should have received, the benefit of the property tax levy required by MCL 35.21," and that the failure to levy and collect the tax set forth in the soldiers' relief fund act "has caused, and continues to cause, plaintiffs great harm and damage." Even if accepted as true, these allegations cannot satisfy the *Lujan* injury in fact requirement because it is not readily apparent how the collection of a tax pursuant to the act would have benefited plaintiffs in a concrete and particularized manner. MCL 35.23 provides that the soldiers' relief commission is to determine the amount and manner of any relief thereunder and that it may discontinue such relief in its discretion. Thus, the amount of relief, if any, that plaintiffs might have received under this act is solely within the discretion of the commission. "[G]reat harm and damage" is not concrete or particularized. Plaintiffs also fail to explain, with particularity, what is meant by "the benefit of the property tax levy required by MCL 35.21." At most, we can only speculate how the existence of a fund would have helped plaintiffs. Accordingly, plaintiffs lack standing to pursue the present actions. [*Id*. at 740-741.]

Here, plaintiff acknowledges that her claim falls outside the narrow scope of taxpayer suits that have been legislatively sanctioned. *Waterford Schools*, *supra*. Plaintiff does not allege

that the school district has engaged in an illegal expenditure or misappropriation of public funds, and it is clear that plaintiff is not challenging the constitutionality of a statute relating to the expenditure of funds. MCL 600.2041(3); MCL 129.61; MCR 2.201(B)(4). Plaintiff's allegations thus do not fall within any of the statutory exceptions to the common law rule that a private citizen has no standing to vindicate a public wrong or enforce a public right where he is not hurt in any manner differently than the citizenry at large. *Waterford Schools, supra*.

Moreover, although plaintiff maintains that she is entitled to pursue the present action against defendants because the school district has purportedly refused to address the problems with the school addition and plaintiff's present and future taxes will be detrimentally impacted by costs related to the faulty construction, plaintiff has failed to demonstrate "an interest distinct from that of the public," *Lee, supra* at 739, as measured by the *Lujan* test. In particular, plaintiff has failed to adequately allege the invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not merely conjectural or hypothetical. *Lee, supra* at 739-740. Although plaintiff generally alleged that teachers and children (including her own) at the school may have suffered injury, counsel for plaintiff acknowledged during the course of oral argument on the summary disposition motions that plaintiff was not pursuing a personal injury claim based on adverse health effects caused by the negligent construction and design of the school building. Instead, plaintiff alleges "injury in fact" primarily in the form of tax expenditures that otherwise would not have been incurred but for the defective construction and design of the school building. However, such claims are merely speculative, and plaintiff has not shown some special grievance which sets her apart from the citizens at large. As noted by this Court in *Altman, supra* at 504-505,

> Plaintiffs also have failed to show with particularity how city funds were spent to the detriment of taxpayers. The requirement that increased taxation be shown with particularity provides governmental units with a necessary shield to protect against judicial scrutiny of all governmental expenditures. As this Court stated in *Killeen v Wayne County Civil Service Comm*, 108 Mich App 14, 19; 310 NW2d 257 (1981):
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> "The bald allegation that tax monies are being expended is too general and conclusory to serve as a springboard for the maintenance of a taxpayer's suit since such allegations would be equally applicable to practically every action taken by a unit of government and would throw open the doors to unlimited, unrestricted citizen's lawsuits."

With regard to plaintiff's assertion that she is entitled to pursue a cause of action *on behalf of* the school district, she cites no persuasive authority suggesting that under the present circumstances, as citizen taxpayer, she may file suit against the parties to a contract with the school district when the district itself, which possesses the discretionary authority to sue or not to sue, has not initiated such an action.

The law relating to a taxpayer's ability to bring an action on behalf of a governmental entity has been concisely summarized in 18 McQuillin, Municipal Corporations (3d ed, Revised 2003), § 52.17, pp 40-43:

> Taxpayers may sometimes sue on behalf of a municipal corporation, to enforce causes of action in its favor, when its officers refuse to do so, and may sometimes pursue pending litigation which the officers wrongfully abandon, sue to set aside default judgments, or prosecute appeals from judgments against the municipality.
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> Taxpayers may bring suit to recover property belonging to the municipality, or for any money which has been paid out or released without authority of law, or to enforce a cause of action belonging to the municipality against a person having money or property belonging to the municipality or who is otherwise liable to suit, provided conditions required by the particular court or state are complied with.
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> *The right of taxpayers to sue upon behalf of a city is generally subject to the following conditions and exceptions:* (1) The municipality itself must have a clear right and power to sue; (2) a taxpayer cannot sue third persons in behalf of the municipality unless the bringing of such action is a duty devolving upon the municipal authorities, *as to which they have no discretion* and which they have refused to perform; (3) either a demand must have been made that suit be brought by the public officers of the municipality, or it must be alleged and shown that such demand would be unavailing; and (4) the action does not lie where it would be grossly inequitable to enforce the claim, nor where the basis of the action is a claim of the taxpayer's rather than that of the municipality. However, the remedy of the taxpayer, in such cases, may not be necessarily confined to a direct action against those against whom the municipality has a cause of action. [Emphasis added.]

Here, the school district clearly has the right and power to sue, by virtue of its statutory authority. See MCL 380.11a. However, plaintiff has not demonstrated that the school district has a nondiscretionary duty to sue the contractors it engaged to renovate the school, and that the school district has refused to perform this duty. On the contrary, the school district has no mandatory duty to bring suit in this case. As a legislatively-created body, the school district conducts business through votes at its school board meetings, MCL 380.1201(1), and, acting through the school board, is empowered to exercise its governmental discretion in determining the appropriate action, if any, to be taken concerning the allegations raised by plaintiff. MCL 380.11a. Plaintiff has provided no documentation indicating that the school board has taken any action on this matter to date.

Plaintiff in essence seeks to supplant the school district's authority by suing on its behalf in the absence of any authorization from the school board. There is no provision in Michigan law that would entitle her to proceed on this theory. The dissatisfaction of a taxpayer with the conduct or discretionary decisions of a governmental unit does not alone provide an adequate basis for standing. "[S]tanding to maintain a taxpayer's suit cannot be grounded on decisions of a governmental unit that are merely unwise." *Altman, supra* at 505, citing 18 McQuillin, Municipal Corporations (3d ed), § 52.24, p 49.

Plaintiff's reliance on *Ferndale School Dist v Royal Oak Twp School Dist No. 8*, 293 Mich 1; 291 NW 199 (1940), as authority for permitting a taxpayer suit on behalf of the school

district, is misplaced. In that case, the petitioner sought to intervene in an already pending action involving a portion of land annexed by Ferndale from Royal Oak Township but not incorporated into the school district. Whatever considerations govern a citizen's intervention pursuant to court rule in a lawsuit in which a governmental entity is the defendant, they have no bearing on the question presented here: whether a citizen taxpayer may commence a suit against contractors with a governmental entity when the entity has not filed suit. Indeed, intervention to help a governmental entity defend against an injunctive action or a suit for damages raises significantly different policy concerns than bringing a suit that the government entity allegedly could have pursued but did not. Intervention to defend a suit does not pose a severe threat to government discretion.[1] In contrast, allowing a taxpayer to commence an independent action against third parties on behalf of a governmental entity, in the absence of any decision from the governmental entity to pursue such an action, impedes the entity's exercise of its discretion. A governmental entity may choose not to pursue a suit for many reasons, including an assessment that it is meritless, the belief that relief can be more readily obtained through other avenues, or a conclusion that litigation will harm the entity's interests.

For these reasons, in the instant case we conclude that plaintiff cannot bring an action on behalf of the school board against defendants, who are parties to a contract with the school district. The trial court therefore did not err in granting summary disposition in favor of defendants on the basis of plaintiff's lack of standing to pursue the present claims.

With regard to plaintiff's motion for class action certification, this Court has held that "[a] plaintiff who cannot maintain the cause of action as an individual is not qualified to represent the proposed class." *Zine v Chrysler Corp*, 236 Mich App 261, 287; 600 NW2d 384 (1999). Thus, the trial court properly held that because plaintiff lacked standing to bring suit, her motion for certification of a class action was rendered moot.

Affirmed.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell

[1] As noted in 18 McQuillin, Municipal Corporations (3d ed, Revised 2003), § 52.10, pp 18-20, taxpayers may typically intervene in accordance with the court's discretion if the taxpayer has an interest in the suit or where the government has refused to defend itself or where there is some suggestion of fraud of collusion.